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Can Someone Deal Internet Poker a Good Hand? Reform is still needed, but the Skilled Game Protection Act is flawed

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The U.S. Department of Justice (DOJ) recently has gone after Internet poker businesses with a vengeance—even though it may not have the authority to do so—driving many of them overseas. Now the House of Representatives is considering legislation to tell the Justice Department to leave Internet poker businesses alone. So would that constitute a needed clarification of jurisdictional authority? Sadly, no. The same statutory ambiguities that the Justice Department is now using to drive Internet poker out of America are in the proposed bill.

The Skill Game Protection Act (SGPA, H.R. 2610), sponsored by Rep. Robert Wexler (D-Fla.), seeks to clarify that games of skill that are played on the Internet, like Internet poker, are both legal and regulated.¹ The bill would amend two statutes—the 2006 Unlawful Internet Gambling Enforcement Act (UIGEA)² and the 1961 Wire Act.³ These are the two principal federal statutes outlawing interstate betting and wagering over the telephone or the Internet, mainly by making it illegal for businesses to transfer gambling-related funds.

Neither statute clearly affects Internet-based games of skill—games in which players' mental abilities, rather than pure luck, determine outcomes. Yet the Justice Department has investigated and shut down businesses involved with Internet-based games of skill based on a flawed interpretation of the statutes. The result has been a climate of confusion, in which possibly legal businesses leave the American market rather than face the Justice Department's capricious enforcement of these laws.

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Unfortunately, the Skill Game Protection Act is unlikely to solve this situation. It seeks to create certainty, but it is poorly drafted and leaves key terms undefined—something that could easily create even more confusion.

SGPA's History. The Unlawful Internet Gambling Enforcement Act attaches criminal and civil penalties to businesses that move funds associated with illegal bets and wagers across state lines, using the Internet. It was intended to address ambiguities in the Wire Act, a 1961 statute which sought to stop illegal betting and wagering over the telephones and the telegraph “wires.” Now that modern-day wireless technology is on the rise, no one can agree on whether the Wire Act applies to Internet gambling, and, if so, what kind of Internet gambling it would prohibit and exactly to whom the criminal penalties would apply.

The Justice Department has claimed the Wire Act applies broadly, to all online games, rather than only to the sports wagering, carried over “transmission of a wire communication,” mentioned in the statute. There have been few cases considering this interpretation. The courts that have considered the issue disagree with DOJ’s broad interpretation,⁴ but other more recent cases have upheld the Justice Department’s broad interpretation that the Wire Act does in fact restrict Internet gambling.⁵

Congress passed the Unlawful Internet Gambling Enforcement Act in 2006, hoping to fix this ambiguity. The Act did nothing of the sort.

Confusion over Games of Skill. If it were ever unclear whether the Wire Act applied to Internet gambling, UIGEA does make clear that Internet gambling is within the criminal law’s purview, but *how* precisely and to which games specifically is not clear.⁶

UIGEA prohibits “unlawful internet gambling,” which it defines as meaning “to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.”

The statute defines a bet or wager as “the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.”

So the crucial question is: Is Internet poker a “game subject to chance” for which no one can transmit bets and wagers across state lines without violating UIGEA?

While some may argue that Internet poker is a game of skill,⁷ and is therefore not a “game subject to chance,” no one can claim to know for certain the legal status of Internet poker and other games of skill under UIGEA. The Department of Justice has yet to interpret the statute, but given recent history, it is reasonable to expect a broad

interpretation. This is, after all, an agency that interpreted the even less obviously applicable Wire Act as applying to Internet poker.⁸

Moreover, since Courts give great deference to an agency's reasonable interpretations of statutes that agency is called on to enforce,⁹ it also seems likely that at least *some* courts will find that UIGEA does, in fact, apply to Internet poker and other games of skill (if they even find poker to be a game of skill).

Internet poker businesses are not waiting around to find out how the Justice Department might interpret UIGEA. The Internet poker industry in the United States has jumped ship for legally friendlier, more predictable, jurisdictions.¹⁰ If UIGEA is not intended to regulate Internet poker and other online games of skill, then it is having the effect of driving those businesses away—and when not away, underground.

What the SGPA Would Do. The Skill Game Protection Act consists largely of amendments to both the Wire Act and UIGEA. It amends the Wire Act to make explicit that it does not prohibit “poker, chess, bridge, mahjong or any other game where success is predominantly determined by a player's skill.”

The SGPA also amends UIGEA in two ways. First, it adds a section stating that UIGEA's restrictions do not apply to games of skill.¹¹ It also adds a section requiring the Secretary of the Treasury to prescribe regulations requiring “each person who operates a game of skill on the Internet to maintain the following:

- (1) Appropriate safeguards to ensure that the individual participant depositing funds is 18 years of age or older.
- (2) Appropriate safeguards to ensure that the individual participant is physically located in a jurisdiction that does not bar participation in the particular Internet games of skill in which the individual participates at the time in the individual participates.
- (3) Appropriate mechanisms to ensure that all taxes relating to Internet games of skill due to Federal and State governments and to Indian tribes from individual participants are collected as required by at the time of any payment of any proceeds of Internet games of skill.
- (4) Appropriate safeguards to combat fraud and money laundering as may be prescribed by regulations issued by the Secretary or a designee of the Secretary.
- (5) Appropriate safeguards to combat compulsive participation in Internet games of skill.
- (6) Appropriate safeguards to protect the privacy and security of any person engaged in Internet games of skill.¹²

Games of Skill Should Be Legal. There is no compelling reason to prohibit games of skill. To begin with, games of skill cannot be fixed in the way that games of chance can be—skilled players will quickly recognize a fraudulent game and stop playing. Operators of fraudulent games of skill can be prosecuted under existing laws against fraud.¹³

In addition, a common argument for banning Internet poker and other games of skill is that the businesses that run these games can easily be used as fronts to hide terrorist activity or to launder money. This claim is not credible. A 2002 Government Accounting Office report on Internet gambling states that, despite repeated concerns that Internet gambling will be used as a way to launder money, there is no evidence that Internet gaming sites are more likely to be used as vehicles for money laundering than any other Internet site or business.¹⁴

The Skill Game Protection Act: Pro and Con. Skill games should be legal. The current law is an ambiguous mess that is causing confusion, fear, and secrecy. The Skill Game Protection Act is an improvement on the current situation, but the legislation is still flawed in a number of ways.

Just as UIGEA is unclear on who exactly is prohibited from being involved with Internet gambling, this statute imposes duties without making clear upon whom those duties fall. Specifically, Section 5368 would impose a number of duties upon “each person who operates a game of skill on the Internet” without providing any other guidance as to who would fall under such a category. Does this apply to each individual who is involved with aspect of the running of an Internet-based game of skill? To the owner of such a company? To the owner of a company that facilitates the transfer of funds between online poker players? To the receptionist at a company that facilitates the transfer of funds between online poker players?

The statute does not define games of skill. While most people have some general idea of what exactly constitutes a game of skill, the law requires a clear definition to avoid confusion. The Congressional Findings section of the statute describes games of skill as *not* being games of chance.¹⁵ The SPGA’s sole operating purpose is to clarify ambiguities in UIGEA and the Wire Act regarding games of skill. Unfortunately, it fails on that count.¹⁶

Worse, it throws some new vague concepts into the debate. Two provisions require the federal government and game operators to combat compulsive participation in Internet games of skill, without defining “compulsive participation.” It is also difficult to see what purpose this would serve. Both states and the gambling industry itself have programs to treat problem gambling.¹⁷

Conclusion. The Skill Game Protection Act is an improvement on the current legislation, as it makes clear that games of skill may be legally played on the Internet. However, it is poorly drafted, and its ambiguous language can lead to greater confusion

than already exists. Such ambiguity is to blame for many of the problems in the Internet skill games world today. Lawmakers should ensure that players, businesses, and others know what they are allowed to do, and what is required of them. It would be best if the Department of Justice knew all this, too.

Notes

¹ The Skill Game Protection Act was introduced by Rep. Wexler on June 7, 2007. It has not been voted on in the House, and has not made its way to the Senate.

² 31 U.S.C. § 5362. The text of UIGEA may be found here (scroll down to Title VIII): http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ347.109 (last visited on June 16, 2008).

³ 18 U.S.C. §1084. The text of the Wire Act may be found here (scroll down the page to section 1084): <http://uscode.house.gov/download/pls/18C50.txt> (visited on June 16, 2008).

⁴ See, e.g., *In re Mastercard Int'l Inc.*, 132 F. Supp. 2d 468 (E.D. La. 2001), aff'd 313 F.3d 257 (5th Cir. 2002).

⁵ While other federal statutes and some state laws also restrict Internet gambling to some degree, the Government Accounting Office determined that none did so decisively, and the ambiguities remained as to what kinds of Internet gambling, exactly, was prohibited, and against whom these prohibitions applied. United States General Accounting Office, "Internet Gambling An Analysis of the Issues," December, 2002, www.gao.gov/new.items/d0389.pdf (last visited July 8, 2008). See, e.g., *United States v. Lombardo*, 2007 U.S. Dist. LEXIS 91696 (D. Utah December 13, 2007).

⁶ Note that the law does not actually criminalize Internet gambling; what it does is make it illegal for anyone "engaged in the business of betting or wagering" to "knowingly accept" funds "in connection with the participation of another person in unlawful Internet gambling." Ambiguities beyond those discussed here abound, including the question of what constitutes being "engaged in the business of betting or wagering" and how much knowledge it would take before the acceptance of funds would constitute a violation of the statute.

⁷ It would seem obvious that poker is a game of skill, like roulette is a game of chance; in poker, one uses strategy and cunning, while in roulette one has only the luck of a wheel's spin. However, there is no consensus as to what constitutes a "game of skill," which makes it even more difficult to gauge the likely effect of this statute on Internet poker and other games. A game of skill is generally considered to be a game in which better players win more often than worse players, but this is not a universal definition. Professional poker champion Annie Duke wrote on her website that she and several other poker players consider the test of whether one could intentionally *lose* the game to be the test of whether a game is a game of skill or luck. A poker player could intentionally lose a hand of poker, while a roulette player could never intentionally lose a round of roulette. Thus, poker is a game of skill and roulette is a game of chance. Annie Duke, "Another Demonstration Of Skill In Poker," February 27, 2007, <http://www.annieduke.com/journal.php?journalID=1708>.

⁸ See Whittier Law School Professor I. Nelson Rose's discussion of the Justice Department's interpretation of the Wire Act on his personal website, *Gambling and the Law*, http://www.gamblingandthelaw.com/columns/2006_act.htm (last visited on June 13, 2008). No regulations have been promulgated yet which would give the Department of Justice's interpretation of UIGEA. However, after recent hearings held on UIGEA held by the House Domestic and International Monetary Policy, Trade, and Technology Subcommittee, it was widely reported in poker-oriented publications, as well as other publications, that the Justice Department considers UIGEA to apply to Internet poker. See, e.g., Martin Harris, "House Hearing Examines Burdensome UIGEA Regulations," *Poker News*, <http://www.pokernews.com/news/2008/04/house-hearing-examines-uigea-regulations.htm> (last visited on June 16, 2008).

⁹ When a statute is silent or ambiguous on a particular point, the court may defer to the agency's interpretation. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

¹⁰ Amy Callistri, "UIGEA Effects: Hints from Online Poker's Financials," *Poker News*, <http://www.pokernews.com/news/2007/2/uigea-effects-online-poker-financials.htm> (last visited on June 16,

2008). There have been reports of at least one poker business re-allowing United States customers to play, so perhaps not all is lost. Jennifer Newell, "Doyle's Room Returns to the US Market," November 11, 2007, *Poker Player*, <http://www.pokerplayernewspaper.com/viewarticle.php?id=2310> (last visited on June 16, 2008). The Treasury Department proposed agency rules to UIGEA in October, 2007, but there are no agency rules in effect yet which would aid in interpreting UIGEA or which would make explicit the government's view on whether it applies to Internet poker or other games of skill—and even the proposed rules fail to give guidance on this issue.

¹¹ This part of the statute actually refers to the Wire Act—specifically to the new section of the Act that exempts games of skill from its purview—and thus clears up any ambiguities as to whether UIGEA and the Wire Act concern different activities or the same activities. Under SGPA it is clear that they concern the same activities—at the very least, neither applies to games of skill.

¹² H.R. 2610, Section 4(a).

¹³ Steven Levitt's *New York Times* Freakonomics blog addressed a similar point on October 17, 2007, <http://freakonomics.blogs.nytimes.com/2007/10/17/the-absolute-poker-cheating-scandal-blown-wide-open/> (last visited June 16, 2008).

¹⁴ United States General Accounting Office, "Internet Gambling An Analysis of the Issues," December, 2002, www.gao.gov/new.items/d0389.pdf (last visited June 16, 2008).

¹⁵ Statutes frequently have "congressional findings" sections which give the factual justification for the legislation. Courts view congressional findings as guides in statutory interpretation that help discern Congress's intent in passing the legislation. Congressional findings are given deference by the courts, but are not dispositive. *See, e.g., United States v. Macewan*, 445 F.3d 237, 249-250 (3d Cir. 2006). *See also* Devins, Neal, "Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis," 50 *Duke L. J.* 1169 (2001).

¹⁶ April 30, 2007 press release on the website for Sen. Jon Kyl (R-Ariz.), "Repealing UIGEA: Don't Bet on It," <http://kyl.senate.gov/record.cfm?id=273370> (last visited June 16, 2008).

¹⁷ Also, the wording seems rather poor. A woman earning a decent living who spends all night every night after work playing poker with a penny ante and 25-cent limit well be a "compulsive" gambler but it is difficult to see why the government should try to stop her or even get involved. A man who, while drunk, bets his children's college fund on a spin of a roulette wheel may not have a "compulsion" to gamble, but obviously has a gambling problem.